

IN THE COURT OF APPEALS OF IOWA

No. 0-663 / 09-1109
Filed October 20, 2010

HERMAN ADDISON JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Webster County, Allan L. Goode,
Judge.

Herman Addison Jr. appeals from the district court order denying his
application for postconviction relief. **AFFIRMED.**

Herman Addison Jr., Fort Madison, pro se.

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, Ricki Osborn, County Attorney, and Jennifer Bonzer, Assistant County
Attorney, for appellee State.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes
no part.

DOYLE, J.

Herman Addison Jr. appeals from the district court order denying his application for postconviction relief. On appeal, he contends: (1) he was denied effective assistance of counsel when his trial counsel allowed him to execute incomplete written guilty plea forms; (2) the district court erred by not merging the crimes of identity theft and forgery, and (3) the district court erred by not articulating the reasons for consecutive sentencing. Upon our review, we affirm.

I. Background Facts and Proceedings.

In January 2007, Herman Addison Jr. paid for a purchase at a convenience store with a check from another's checking account without permission. Thereafter, the State filed a two-count trial information against Addison. Count I, as later amended, charged Addison with identity theft in violation of Iowa Code sections 715A.8(1) and 715A.8(2) (2007), an aggravated misdemeanor. Count I asserted Addison "with the intent to obtain a benefit did fraudulently obtain a checking account number belonging to [another] and attempted to use that checking account number to obtain property without the authorization of [the account owner]." Count II, as amended, charged Addison with forgery as a habitual offender in violation of sections 715A.1, 715A.2(d),¹ 715A.2(a)(3), and 902.8, a class "D" felony. Count II asserted that Addison

with the intent to defraud [a convenience store and/or the account owner], did possess a writing which he knew to be forged, purporting to be the act of [the account owner] who did not

¹ There is no such section in the 2007 edition of the Iowa Code. Based upon the allegations concerning the charge in the trial information and the minutes of testimony, it is evident the State intended to charge Addison under section "715A.2(1)(d)." We therefore identify the charging Code section as section 715A.2(1)(d).

authorize that act, having twice previously been convicted of a felony.

In September 2007, Addison entered into a plea agreement with the State whereby Addison agreed to plead guilty to the reduced charges of aggravated misdemeanor forgery² and identity theft. In exchange, Addison would receive consecutive sentences of probation, and the sentences were to be imposed consecutive to an existing suspended sentence for willful injury, for which Addison was on probation. Addison then pled guilty and was sentenced according to the plea agreement.³ Addison did not appeal his convictions.

² On the date the plea agreement was filed, the State filed a motion to amend Addison's forgery charge. The motion to amend requested leave to amend "from the charge of [f]orgery in violation of Iowa Code section[s] 715A.1, 715A.2(d) [sic], 715A.2(a)(3)," and asked that the charge be amended to [f]orgery in violation of Iowa Code section[s] 715A.1 and 715A.2(2)(b) for the reason that [Addison] has agreed to plead guilty to the amended charge and the amended charge is supported by the facts; and that the furtherance of justice can be attained by doing so.

The district court approved the motion and so amended the charge.

We note that as amended, the charge against Addison lacks an allegation of an act of forgery. See Iowa Code § 715A.2(1)(a), (b), (c), & (d). We need not decide the legal effect of this omission, if there is any, since it was not raised in the district court. *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002). Additionally we note that while a "check" is specifically included as a writing in section 715A.2(2)(a)(3), see Iowa Code § 715A.2(2)(a)(3) ("Forgery is a class 'D' felony if the writing is or purports to be . . . [a] check . . ."), a "check" is not mentioned as a writing within section 715A.2(2)(b). See Iowa Code § 715A.2(2)(b) ("Forgery is an aggravated misdemeanor if the writing is or purports to be a will, deed, contract, release, commercial instrument, or any other writing or other document evidencing, creating, transferring, altering, terminating, or otherwise affecting legal relations."). Again, we need not decide in this case the legal effect, if there is any, of the omission of the term "check" in section 715A.2(2)(b) since the issue was not raised in the district court.

³ The filed plea agreement in Addison's forgery charge asserted Addison was charged with "forgery, an aggravated misdemeanor, in violation of Iowa Code [sections] 715A.1 [and] 715A.2(2)(b)." We, again, note the lack of an allegation of an act of forgery in the charge referenced in the plea agreement, but further note that in the factual basis portion of the guilty plea form, Addison did admit committing an act of forgery by stating he "[a]ttempted to pass a check belonging to [account owner] to obtain property at [the convenience store]. [Account owner] did not authorize the act."

In October 2007, Addison's sentences of probation were revoked after Addison admitted he violated the terms of his probation by committing a theft from a grocery store and having a marijuana pipe in his possession. The court imposed two two-year sentences for Addison's convictions of aggravated misdemeanor forgery and identity theft. The court also imposed a five-year sentence for Addison's willful injury conviction. The court ordered that all three of Addison's sentences run consecutively, thus imposing a total of nine years imprisonment.

On November 25, 2008, Addison filed an application for postconviction relief alleging his trial counsel was ineffective in advising him to plead guilty to forgery and identity theft when there was no factual basis for the crimes. Additionally, Addison asserted the district court imposed an illegal sentence by failing to merge the forgery and identity theft charges, and the district court erred in failing to adequately state its reasons for the imposing consecutive sentences.

The matter proceeded to trial. Thereafter, the district court entered its order dismissing Addison's application. The court found there was a factual basis for Addison's pleas. Additionally, the court found that neither forgery nor identity theft was an included offense of the other. The court also concluded that Addison's consecutive sentences were imposed pursuant to a plea agreement and found no merit in Addison's complaint.

Addison now appeals.

II. Discussion.

On appeal, Addison asserts: (1) he was denied effective assistance of counsel when his trial counsel allowed him to execute incomplete written guilty

plea forms; (2) the district court erred by not merging the crimes of identity theft and forgery; and (3) the district court erred by not articulating the reasons for consecutive sentencing. For the reasons that follow, we disagree.

A. Ineffective Assistance of Trial Counsel.

The standard of review on appeal from the denial of postconviction relief is for errors at law. *Kane v. State*, 436 N.W.2d 624, 626 (Iowa 1989). To the extent Addison's claims involve constitutional rights, our review is de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). We give weight to the district court's factual findings, especially when concerning credibility assessments. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

In order to prevail on an ineffective-assistance-of-counsel claim, a defendant is required to show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Ledezma*, 626 N.W.2d at 142. "Failing to perform an essential duty means counsel's performance fell outside of the normal range of competency." *State v. McCoy*, 692 N.W.2d 6, 14 (Iowa 2005). To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Although a defendant is required to prove both elements, we do not always need to address both elements. *Ledezma*, 626 N.W.2d at 142. If

a claim lacks prejudice, the claim may be decided on that ground alone without deciding whether the attorney performed deficiently. *Id.*

Here, Addison specifically contends he was denied effective assistance of counsel when his trial counsel allowed him to execute incomplete written guilty plea forms. However, this is not a claim Addison asserted below in his application for postconviction relief. Addison's claim below was that "there was no factual basis for the plea agreement." The district court rejected that contention, finding a factual basis existed, and we reject it as well. Addison did not advance his current argument, and the district court did not rule on this unraised claim, since it had no opportunity to do so. We thus hold that Addison's current claim is not properly before us. See *State v. Lewis*, 675 N.W.2d 516, 521-22 (Iowa 2004) (discussing that on appeal we will not decide a case based upon a ground, even a constitutional ground, not raised by a party in the district court); *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (holding that an appellate court will not consider an issue raised for the first time on appeal).

Even assuming, *arguendo*, that Addison preserved this claim, we would not find it meritorious. Since it was not asked to, the court made no factual finding as to whether or not the forms were filled out at the time Addison signed them. Addison's trial counsel had no recollection as to whether the forms were filled out when signed by Addison, but admitted it was possible. Addison acknowledged at the trial on his postconviction relief application that what was written in the form was exactly the agreement to which he had agreed. Addison cannot demonstrate the requisite prejudice. Accordingly, even assuming the

forms were not filled out when signed by Addison, we find his trial counsel was not ineffective.

B. Merger of the Convictions.

Addison next contends the district court erred by not merging the crimes of identity theft and forgery. He asserts identity theft is necessarily included in forgery and thus should have merged into the forgery. Our review is for correction of errors at law. Iowa R. App. P. 6.907 (2009).

Merger implicates the legality of the sentence. *State v. Anderson*, 565 N.W.2d 34, 343-44 (Iowa 1997). An illegal sentence can be challenged at any time, *State v. Kress*, 636 N.W.2d 12, 17 (Iowa 2001), and we can address the issue even if it was not expressly raised below. *State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998). Under our merger statute, “[n]o person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted.” Iowa Code § 701.9.

“To determine whether one crime is a lesser-included offense of another, we apply the impossibility test and look to the elements of the offenses in question.” *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). We look to the elements of the greater offense (aggravated misdemeanor forgery) to see if it can be committed without also committing the lesser offense (aggravated misdemeanor identity theft). See *State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001). “If the greater offense cannot be committed without also committing the lesser offense, the lesser is included in the greater. We call this the impossibility test.” *Id.*

The “elements test” is “an aid in using the impossibility test and is fully subsumed in it.” *Id.* In comparing the elements of the two offenses, we look to “the statutory definition of the greater offense rather than the evidence by which the offense may be proved in a particular case.” *State v. Webb*, 313 N.W.2d 550, 552 (Iowa 1981). “We place the applicable statutes side by side and examine their elements in the abstract.” *State v. Mulvany*, 600 N.W.2d 291, 293 (Iowa 1999) (quoting *State v. Jeffries*, 430 N.W.2d 728, 739 (Iowa 1988)).

The question we must answer is whether forgery can be committed without also committing identity theft. We answer in the affirmative.

Iowa Code section 715A.2(1) sets forth the elements of forgery:

A person is guilty of forgery if, with intent to defraud or injure anyone, or with knowledge that the person is facilitating a fraud or injury to be perpetrated by anyone, the person does any of the following:

- a. Alters a writing of another without the other’s permission.
- b. Makes, completes, executes, authenticates, issues, or transfers a writing so that it purports to be the act of another who did not authorize that act, or so that it purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or so that it purports to be a copy of an original when no such original existed.
- c. Utters a writing which the person knows to be forged in a manner specified in paragraph “a” or “b”.
- d. Possesses a writing which the person knows to be forged in a manner specified in paragraph “a” or “b”.

Pursuant to section 715A.8(2), “[a] person commits the offense of identity theft if the person fraudulently uses or attempts to fraudulently use identification information of another person, with the intent to obtain credit, property, services, or other benefit.”

When we compare the elements of forgery, as set forth in section 715A.2(1), and identity theft, as set forth in section 715A.8(2), we recognize the

two crimes require different intents. Section 715A.2(1) requires an “intent to defraud or injure,” whereas intent under Section 715A.8(2) is limited to an “intent to obtain credit, property, services, or other benefit.” With no intent to benefit one’s self, and with no intent to obtain credit, property, or services, one may employ forgery as a means to defraud or injure another. The universe of intent to defraud or injure anyone is much larger than the limited scope of a fraudulent intent to obtain credit, property, services, or other benefit. Thus, one may commit forgery without also committing identity theft. Consequently, we conclude that forgery, as set forth in section 715A.2(1), is not a lesser-included offense of identity theft, as set forth in section 715A.8(2). Because the two crimes have separate and distinct elements, the two offenses do not meet the impossibility test and we reject Addison’s contention the two offenses should be merged. We therefore find the district court did not err in not merging Addison’s forgery and identity theft offenses.

C. Consecutive Sentences.

Finally, Addison contends the district court erred by not articulating the reasons for consecutive sentencing. The State argues Addison failed to preserve his claim for review, and, if Addison preserved his claim, the district court’s failure to set forth reasons for the sentence was harmless error. Our review of the district court’s sentencing decision is for abuse of discretion. *State v. Evans*, 671 N.W.2d 720, 727 (Iowa 2003).

Under Iowa Rule of Criminal Procedure 2.23(3)(d), the sentencing court must state on the record its reasons for selecting a particular sentence. See *State v. Oliver*, 588 N.W.2d 412, 414 (Iowa 1998). A court must also give

reasons for its decision to impose consecutive sentences. *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000). The court's statement of reasons may be either written or oral. *State v. Alloway*, 707 N.W.2d 582, 584-585 (Iowa 2006), *overruled on other grounds by State v. Johnson*, 784 N.W.2d 192, 197-98 (Iowa 2010). The purpose of this requirement is to give appellate courts the opportunity to review the discretionary nature of the sentencing. *Id.* at 584.

"It is a defendant's obligation to provide this court with a record affirmatively disclosing the error relied upon." *State v. Mudra*, 532 N.W.2d 765, 767 (Iowa 1995). We will not permit a defendant to raise an issue without attempting to give the court a record upon which to decide the issue. See *Alloway*, 707 N.W.2d at 586. We cannot speculate as to what took place.

When the absence of a record of the reasons for a sentence includes the absence of a transcript of the sentencing proceeding, a defendant has several additional methods to create a record. Our rules of criminal procedure allow a defendant to create a record by means of a bill of exceptions under rule 2.25 after sentencing, or by filing a supplemental statement of the record under Iowa Rule of Appellate Procedure 6.806(1) after an appeal has been filed. See *also id.* (citing then numbered appellate rule 6.10(3)); *Mudra*, 532 N.W.2d at 767. A defendant's failure to utilize any of these methods to produce a record serves as a waiver of the defendant's challenge to the district court's failure to state the reasons for the sentence it imposed. *Alloway*, 707 N.W.2d at 585-86 (stating a defendant will not be permitted to raise an issue on appeal concerning an abuse of discretion in sentencing without attempting to give the court a record upon which to decide the issue); *Mudra*, 532 N.W.2d at 766-67. Thus, in *Mudra*, our

supreme court determined the defendant had waived error on his claim of the district court's abuse of discretion in failing to give reasons for the sentences, because the defendant waived transcription of the proceedings and failed to use other methods to produce a record. *Mudra*, 532 N.W.2d at 766-67.

Here, there is no transcript of the sentencing proceeding. Addison failed to produce a record by other means either through a bill of exceptions after sentencing or by filing a supplemental statement of the record with this appeal. See Iowa R. Crim. P. 2.25; Iowa R. App. P. 6.806(1). Addison's failure to produce a record serves as a waiver of his contention that the district court erred by failing to state on the record its reasons for the sentence. *Alloway*, 707 N.W.2d at 586.

However, even assuming, *arguendo*, that Addison preserved this claim, we would not find it meritorious. Where the "sentencing court was merely giving effect to the parties' agreement," a failure to state reasons for the sentence imposed is not reversible error. *State v. Cason*, 532 N.W.2d 755, 756 (Iowa 1995). In those circumstances, there is no purpose in stating the reasons for the sentence and failure to follow rule 2.23(3)(d) is harmless. *Id.*

At the trial on his application for postconviction relief, Addison admitted that he was adamant during plea negotiations that he would not accept a plea agreement that would require imprisonment. His trial attorney testified that he negotiated with the prosecuting attorney an agreement that would reduce Addison's class "D" felony forgery charge down to an aggravated misdemeanor and give Addison probation for both the identity theft and forgery charges, but with consecutive sentences on both charges. Addison admitted that he agreed

the terms of the plea agreement and that he was given a substantial break with the offer because rather than incarceration, it placed him on probation.

Here, Addison was given the opportunity to negotiate the terms of his agreement. The outcome was favorable to him. Based on the parties' agreement, the sentencing court was merely giving effect to the parties' agreement in sentencing Addison to consecutive sentences. Therefore, the district court's failure to set forth reasons for the sentence was harmless, and we find the district court did not abuse its discretion by failing to give reasons for the sentence imposed in this case.

III. Conclusion.

Upon our review, we conclude Addison failed to preserve his claim that his trial counsel was ineffective for allowing him to execute an incomplete written guilty plea form, but find that even if Addison had preserved the claim, he was not prejudiced because he acknowledged that he knew the terms of the plea at the time he executed the plea form and that he received the sentence to which he had agreed. Additionally, we conclude the offense of forgery, as set forth in Iowa Code section 715A.2(1), is not a lesser-included offense of identity theft, as set forth in section 715A.8(2), and do not merge because the two crimes have separate and distinct elements, and therefore do not meet the impossibility test. Finally, we conclude Addison failed to preserve the claim that the district court erred by not articulating the reasons for consecutive sentencing, but find that even if Addison had preserved the claim, the district court's failure to set forth reasons for the consecutive sentences was harmless, as the sentencing court

was merely giving effect to the parties' agreement. Accordingly, we affirm the district court's order denying Addison's application for postconviction relief.

AFFIRMED.